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NO. 93 -

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

AUBREY WILLIAMS

V. Petitioner

CAROL M. PALMORE; COMMONWEALTH OF KENTUCKY; KENTUCKY LABOR CABINET; REX HUNT; ROXANNE MILLER; ELAINE LIKENS; MARY MILES; DENIS KLINE; MARY ANN KIWALA; AND PATRICIA HAYDEN,

Respondents.

PETITION FOR WRIT OF CERTIOARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

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PETITIONER

QUESTIONS PRESENTED

I. THE DECISION BELOW PLACES KENTUCKY IN DIRECT CONFLICT WITH THE FIRMLY ESTABLISHED PRINCIPLES ESPOUSED BY THE UNITED STATES SUPREME COURT IN TITLE VII TYPE CASES.

II. THE DECISION BELOW ENCOURAGES AN ABUSE OF DISCRETION BY STATE TRIAL COURTS IN SUMMARY JUDGMENT PROCEEDINGS INVOLVING TITLE VII LITIGATION.

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AUBREY WILLIAMS petition for a Writ of Certiorari to the Kentucky Supreme Court to review the order filed on March 12, 1993, in Aubrey Williams v. Carol Palmore, Labor Cabinet, et al, NO. 92-SC-809-D.

OPINIONS BELOW

The Order of Opinion-Summary Judgment of the Jefferson Circuit Court, Special Judge Athol Lee Taylor sitting, was issued on Jan. 3, 1991. The order of the Kentucky Court of Appeals affirming the decision of the trial court was issued on September 4, 1992. The Petitoner's Motion for Discretionary Review to the Supreme Court of Kentucky was denied by order dated March 12, 1993.

JURISDICTION

This Court's jurisdiction to review the order of the Kentucky Supreme Court dated March 12, 1993 is invoked pursuant to 28 U.S.C. 1257 (a) and S.C.R. 13 and 14.

STATEMENT OF THE CASE

INTRODUCTION

THE PARTIES

A. PETITIONER

Aubrey Williams, whom Respondents' counsel gleefully point out was once suspended from the practice of law, (for writing a disparaging letter to a judge), is an ordained Baptist minister pursuing a Ph.D at the Southern Baptist Theological Seminary. He is also a former State Representative and civil rights advocate.

B. RESPONDENTS

1. The State of Kentucky has a black population of roughly eight percent. State government's black workforce historically has fluctuated between three and five percent with less than one percent occupying upper and middle-management positionns. In the private sector black

entrepreneurship is virtually non-existent; indeed, Kentucky's largest city boasts no black-owned business in either its business district or its suburban malls. Kentucky's multi-layered court system: Supreme Court, Court of Appeals, circuit court, district court and family court (Jefferson County only), enjoys only two black district court judges and one circuit/family court judge. Black representation on regulatory boards and commissions, including the Bar Association, is equally abysmal.

2. The Kentucky Labor Cabinet employed roughly three hundred employees, including approximately twenty division directors at the time of the lawsuit below. Black Kentuckians held about twenty of those slots. Prior to the Petitioner's employment, no black Kentuckian had ever held a division directorship. Following his dismissal, the Cabinet hired another

black, who was kept on until summary judgment was entered against Williams. That individual was then forced to resign, returning the Cabinet to its orginal complexion.

3. Carol M. Palmore is the wife of the highly popular, erudite, and influential former Chief Justice of the Supreme Court of Kentucky. Palmore has enjoyed the patronage position of Labor Secretary under two gubernatorial administrations, including the current one.

4. Co-conspirator, Roxanne Miller, was a businesswoman, holding an executive-secretary position with the Special Fund. She was fond of boasting that her family still owned their old slave plantation, and that non-property owners should not be allowed to vote.

5. Elaine Likens was a janitor and messenger for the Special Fund, whose

father was a member of the **Ku Klux Klan.** She subsequently confessed to her doctor that she was troubled about her role in thefiring of Williams after watching the Thomas Hill hearings on t.v. Petitioner's motion to reopen was denied.

6. Mary Miles was a secretary, who recanted allegations which contributed to Williams' termination. Her deposition, however, was not allowed into evidence because of Petitioner's alleged failure to file it in a timely manner.

7. Co-conspirators Rex Hunt, Denis Kline, and Mary Ann Kiwala were attorneys for the Labor Cabinet. Hunt was General Counsel at the time of the action below. Kline was the son-in-law of Kentucky's former Speaker of the House of Representatives.

HISTORY OF THE CASE

Aubrey Williams filed suit in

Jefferson Circuit Court on June 7, 1988 alleging defamation of character and that he was terminated from his job as Director of the Special Fund, a division of the Kentucky Labor Cabinet, because of his race. On February 2, 1990, the Respondents filed a motion for summary judgment. On June 28, 1990, the case was transferred to Judge Athol Lee Taylor, circuit judge for Bullitt County. Williams objected to the transfer on the grounds that he did not feel he could get a fair trial because of poor race relations in Bullitt County. On January 10, 1991, Judge Taylor gave the Respondents a summary judgment, citing in support thereof Celotex Corporation v. Catlett, 106 S.Ct. 2548 (1986), and Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1906), and F.R.C.P. 56. He did not articulate any factual reasons for his decision.

The Kentucky Court of Appeals affirmed the trial court, holding that Williams had failed to establish a prima facie case. The Court reasoned that Furnco Construction Corp. v. Waters, 98 S.Ct. 2943 (1978) was distinguishable. The Court also held that Williams could not meet his burden under McDonnell Douglas Corp. v. Green, 93 S.Ct. 1817 (1973). With respect to the defamation of character issue, the Court held that the Respondent, Palmore, enjoyed executive privilege under Kentucky law.

Williams' Motion for Rehearing was denied on September 4, 1992. A timely motion for discretionary review was made to the Kentucky Supreme Court, which declined to review the case on March 12, 1993. This Petition For A Writ of Certiorari follows that decision.

STATEMENT OF THE FACTS

Williams was hired as the Director of

the Special Fund in November, 1984. He was the first and only black director in the entire history of the Labor Cabinet. During negotiations over his apppointment he secured permission to work on causes which directly impacted the African-American community and women [Transcript of Record, John Wells-depo. pp.23-25] (hereinafter "TR"). Through-out his employment, Williams had both explicit and implied authority to work on labor and non-labor related matters affecting Kentucky's African-American community and women [id. pp.30-42; Exhibits 1 through 4, Wells depo].

The Special Fund maintained a subsidiary office in Louisville which constituted about 25% of its total operation. Previous directors had spent little time and attention there; consequently, its employees became

notorious in their disregard for rules and regulations. Williams was ordered to improve the professional atmosphere and conduct of that office [Id., pp.55-58].

During the entire three years of his tenure not a single complaint was registered against Williams by either Governor Collins, Secretary Wells, or Secretary Palmore concerning his job performance. He did not experience any problems with Palmore until two incidents occurred. First, he objected to her request for him to recommend the hiring of her former law firm and friends over current contract attorneys, including two African-Americans. Second, he attempted to discipline Roxanne Miller, who ran a business out of the office; who called Williams a "nigger"; and who felt that only property owners should be allowed to vote.

Miller and two other employees filed

grievances against Williams when he attempted to discipline them. Palmore appointed two subordinates to Williams to conduct an Internal Review into any and all problems at the Louisville Office [TR, Palmore Depo., Vol. 2, p.122]. It was understood that Palmore and Williams would discuss the findings at the conclusion of the Review, and that Williams would be allowed to question the grievants.

Despite the uncovering of chronic problems, and violations of personnel rules and regulations by the grievants, no corrective action was taken by Palmore. Nor did she have the Review Team transcribe and make a part of their report the numerous positive comments made about Williams. Nor did they include the evidence of the many violations of rules and regulations by certain employees. Instead, Palmore fired Williams, claiming

he was a thief; that he misused personnel and equipment; that he was an erratic manager; and that he denied an employee certain rights, all without affording him an opportunity to refute the allegations consistent with Williams' conditional waiver of his rights to participate in the grievance proceedings.

It is significant to note that the Internal Review coincided with Williams' refusal to acquiesce to the hiring of Palmore's firm. It is equally significant that no white director had ever been subjected to such treatment; nor had any of them ever been the subject of an investigation based on grievances by their employees, much less fired because of complaints by disgruntled employees who had violated statutory laws, personnel regulations and office policy [Id. pp.121-122].

It is worthwhile to mention that the position of Director of the Special Fund--when vacant near the end of a Governor's term--had never before been filled by a non-merit employee [Wells depo., pp.50-65]. Yet, Palmore hired Larry Beale, an African-American, to replace Williams. (Beale, himself was fired after Summary Judgment was given with a few months remaining in the Wilkinson Administration. His position was filled by a merit employee from within). It is significant to note that Beale was allowed to maintain a full-time law practice and part-time employment with the city of Louisville, while serving as the full-time Director of the Special Fund [TR, Larry Beale depo., pp.23-24].

The only situation in State government comparable to Williams' dismissal involved the white Director of the Kentucky

Commission on Human Rights. Grievances had been filed against him by subordinate employees. Not only was he investigated by his superiors, operating under proper authority, he was also allowed to defend himself and rebut the allegations after the investigation had ended [TR, Arthur Hatterick depo., pp. 15-17; Exhibit A, Hatterick depo.].

Palmore admits that she had no probative or substantive evidence to defend or justify her proffered reasons for terminating Williams [TR, Palmore depo., Vol. 1, pp. 137-141]. Moreover, Miller and Likens admitted that they could not substantiate the allegations contained in their grievances [TR, Roxanne Miller depo., pp. 8-10; Elaine Likens depo., pp.7, 9-10, 12, 16 and 17]. These facts, combined with other evidence presented below, provided clear and unequivocal evidence that

Palmore's proffered reasons for terminating Williams were totally false, and pretextual.

Finally, it should be noted that in addition to un-transcribed favorable statements about Williams, two long-term white employees gave clear and strong evidence that Williams was the object of racial discrimination. Both the trial court and Court of Appeals totally disregarded these facts. Incidentally, the alleged thefts and misuse of equipment and personnel involved Petitioner's alleged use of a copy machine for a sermon; the postage meter to mail request to potential blood donors, and an employee to run personal errands. The employee, Regena Thomas was hired specifically to work on matters affecting women and African-Americans, facts which Palmore was not aware of.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW PLACES KENTUCKY IN DIRECT CONFLICT WITH THE FIRMLY ESTABLISHED PRINCIPLES ESPOUSED BY THE UNITED STATES SUPREME COURT IN TITLE VII TYPE CASES.

Even though Furnco, supra, seems to clearly hold that the replacement of one member of a protected class by another does not defeat a claim of discrimination under Title VII type cases, the Kentucky Court of Appeals held that Williams failed to establish a prima facie case for this very reason, stating as follows:

> Williams contends that he established a prima facie case despite the fact the person hired to replace him as director...was also black. He points to Furnco..., where one of the three black complainants was eventually hired, in addition to other blacks... Furnco...is factually dissimilar from the case at bar where only one position is to be filled [Appendix].

The reasoning of the court below simply does not square with the principles espoused in Furnco. There is nothing about

Furnco from which lower courts can logically infer that the number of individuals involved is a factor to be considered in these situations. In fact, Furnco probably represents an aberration insofar as numbers are concerned. The situation most commonly faced by minorities and women, as they seek entrance into positions previously denied them, involves employers who are more interested in tokenism than they are in fair and equal participation.

Employers whose history has been one of exclusion rather than inclusion are more likely than not to resist hiring qualified minorities and women until they find one who matches a certain stereotype. On the other hand, when they discover that they have hired one who exhibits an independence or individuality that displeases them, the employer's intolerance could lead to the

employee's termination as it did in the case before this Court.

The court below also misconstrued and misapplied McDonnell Douglas, supra, and Texas Dep't of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981), concluding that the Respondent's mere articulation of specific reasons for the termination was sufficent. Ironically, the court below, citing McDonnell Douglas, recognized a complainant's right to show that an employer's proffered reason is pretextual. However, the court ignored cold hard facts which exposed the pretext, and the rule announced in Burdine that requires employers to advance legitimate reasons. The following facts were not denied by the Respondents:

1. Two files were kept on Williams--one official, the other unofficial. Only one file was kept on white directors.

2. No white director had ever been the subject of grievances by subordinates.
3. Williams had never been accused of poor work performance.
4. Despite serious violations of personnel rules and regulations by employees, some whom Williams had sought to discipline, the so-called internal review did not lead to any corrective action at the office.
5. Palmore awarded personal service contracts to her former law firm and friends.
6. The instigator of the internal would refer to Williams as a nigger.
7. Palmore secretly sought the support of black leaders prior to firing Williams.
8. Larry Beale's hiring was highly unusual and unprecedented. Further, he was allowed to work full-time for the City of Louisville; and was allowed to maintain a full-time law practice while working full-time for the Labor Cabinet.

As far as the Kentucky courts are concerned, these facts were inconsequential, as were the affidavits of white employees that the Petitioner was accorded the treatment he received because of his race.

The opinion below is also contrary to a host of lower Federal court decisions. In Jones v. Western Geophysical Co. of America, 669 F. 2d 280 (5th Cir. 1982), the court held that a black plaintiff could proceed with a Title VII action even though he had been replaced by another black employee. In the case of Byrd v. Roadway Express, Inc., 687 F. 2d 85 (5th Cir. 1982), the court reinstated a Title VII claim brought by a black plaintiff who had been replaced by another black employee. That court reasoned that the replacement did not necessarily negate the possibility that the complainant's discharge was motivated by racial discrimination. The Fifth Circuit recognized, as the United States Supreme Court has repeatedly stated, "No single formulation of the prima facie evidence test may fairly be expected to capture the many guises in which

discrimination may appear." See also, Howard v. Roadway Express, Inc., 726 F. 2d 1529 (11th Cir. 1984); Nix v. WLCY Radio/Rahall Communications, 738 F. 2d 1181, 1185 (11th Cir. 1984); Diaz v. American Telephone and Telegraph, 752 F. 2d 1356, 1361 (9th Cir. 1985); and Payne v. Frank, 735 F. Supp. 719 (E. D. Mich. 1990).

It is is unquestionable that the Kentucky courts' handling of Title VII type cases is in direct conflict with the United States Constitution and the firmly established principles espoused by the United States Supreme Court. Accordingly, a Writ of Certiorari should issue for the foregoing reasons.

II. THE DECISION BELOW ENCOURAGES AN ABUSE OF DISCRETION BY STATE TRIAL COURTS IN SUMMARY JUDGMENT PROCEEDINGS INVOLVING TITLE VII LITIGATION.

It is well-settled law that summary judgments should be cautiously granted. If the nonmoving party's evidence is merely

colorable, or is not significantly probative, summary judgment is proper. Moreover, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed 2d 202, 106 S.Ct. 2505 (1986). The deleterious effect of improvidently granting summary judgments is clearly illustrated by the case before this Court.

As pointed out previously, one of the principal Respondents confessed that a conspiracy led to the termination of the Petitioner. As this newly discovered evidence did not surface until more than a year after the dismissal of the lawsuit, Williams was not able to have the case reopened. Had the trial court adhered to the principles contained in F.R.C.P. 56 and allowed the Petitioner his day in court;

and had the Kentucky Court of Appeals been more deliberate, this injustice could have been prevented.

One fact remains clear, convincing, and unequivocal: the stated reasons for Williams dismissal were proven to be totally false; consequently, a jury could certainly have found them to be pretextual, just as they could have discerned the hiring of Larry Beale as a reason for Palmore to conceal her true motives. In the same manner the court below ignored the cold hard facts of disparate treatment experienced by the Petitioner.

The claims of minorities, women, and the handicapped and others to their rightful place and participation in the affairs of this country are gaining increased attention. The insistence by these groups to share in the benefits of this country naturally will be met with

resistance in some quarters, and will lead to increased litigation and over-crowded dockets. The resulting tension could likely lead to the premature dismissal of lawsuits, and the improvident use of F.R.C.P. 56. This will invariably lead to an erosion of confidence by citizens in the court system.

The confidence of African-American citizens in Kentucky's court system has never been high. The general mood is that they cannot receive fair and just redress of their grievances in the area of civil rights. The Petitioner respectfully submits that the granting of summary judgment below perpetuates that perception. More importantly, if the decision is allowed to stand, it will invite and encourage the improvident use of F.R.C.P. 56 not only by Kentucky's courts, but by foreign jurisdictions as well.

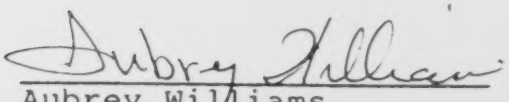
CONCLUSION

The granting of summary judgment by the trial court; its affirmation by the Kentucky Court of Appeals; and the Order Denying Discretionary Review by the Kentucky Supreme Court place Kentucky in direct conflict with the firmly established principles espoused by the United States Supreme Court in Title VII type cases. Their interpretation of McDonnell Douglas and Furnco is in stark contrast to the handling of these cases by lower federal courts.

In effect, the Kentucky courts have formulated their own rules with respect to Title VII and the use of F.R.C.P. 56. This invasion of the province of the United States Supreme Court, if allowed to stand, obviously would invite dangers beyond measure. This Court's authoritative voice is needed to correct Kentucky's

misinterpretation and understanding of Title VII law and the use of summary judgment in adjudicating civil rights disputes.

Respectfully Submitted,



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APPENDIX

NO. 88-CI-04547 JEFFERSON CIRCUIT COURT
DIVISION SEVEN

AUBREY WILLIAMS PLAINTIFF

VS. OPINION - SUMMARY JUDGMENT

CAROL PALMORE, ET AL DEFENDANTS

This action was filed by the Plaintiff Aubrey Williams, on June 7, 1988. Named as Defendants were (1) Carol M. Palmore, individually and as Secretary of the Kentucky Labor Cabinet; (2) Commonwealth of Kentucky; (3) Kentucky Labor Cabinet; (4) Thomas Greenwell, Commissioner of Personnel; (5) Mary Roberts; (6) Jo Stratton; (7) Rex Hunt; (8) Kimbra Taylor; (9) Roxanne Miller; (10) Elaine Likens; (11) Mary Miles; (12) Dennis Kline; (13) Mary Ann Kiwala; (14) Larry Beale; (15) Patricia Hayden; (16) Vonda Spradling and (17) unknown Defendants, address unknown.

The Complaint contains six counts.

Count I alleges that he was wrongfully

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terminated as Director of Special Fund because of his race, that the Defendants acted individually and in concert.

Count II alleges that Defendant Carol Palmore, individually and/or in her official capacity made statements and caused an article to be printed in the Courier-Journal which was false and the statements were designed to embarrass, humiliate and defame Plaintiff's reputation.

Count III alleges that certain Defendants (for convenience identified by number #13, #12, #15, #9, #10, #11) made false statements to other Defendants (#5 and #8) accusing Plaintiff of violating criminal laws.

Count IV alleges that the Defendants acting individually and in concert maliciously conspired to deprive Plaintiff of his rights under both the Kentucky and

the United States Constitution.

Count V. That the Defendants, Carol Palmore and Rex Hunt individually and in their official capacity, withheld information from Plaintiff to which he was entitled under the Open Records Act and the Personnel Rules and Regulations of the Commonwealth.

Count VI alleges that he was without adequate financial resources to prosecute "these matters" and demanded that the state provide all requested documents at no cost to Plaintiff and in addition an attorney and a paralegal.

All Defendants were served by Certified Mail except Mary Roberts, Rex Hunt and Kimbra Taylor. The latter three defendants are before the Court as a result of the filing of pleadings on their behalf. Those Defendants who were served, were served between June 8 and June 22, 1988.

No warning order attorney was appointed for the unknown defendants and they are not before the Court.

On June 23, 1988, the Plaintiff, without leave of Court, filed what he denominated "Plaintiff's First Amended Complaint". He then named as Defendants Wallace Wilkinson, Governor; Brereton Jones, Lt. Governor; Fred Cowan, Attorney General; John Brock, Superintendent of Public Instruction; Bremer Ehrler, Secretary of State; Ward Burnett, Agriculture Commissioner; Bob Babbage, Auditor of Public Accounts, and Bob Meade, State Treasurer. He demanded the same relief as in his original Complaint and for entry of an order that the action was a properly maintainable class action by Plaintiff on behalf of all black citizens of Kentucky.

On June 5, 1988, the Defendants filed

a Motion to Dismiss for failure to state a claim or alternatively, for Summary Judgment.

On July 18, 1988, Hon. John Potter, Circuit Judge in the Seventh Division, on Motion of Defendants, stayed all discovery pending his ruling on the then pending Motions to Dismiss.

After the parties filed extensive briefs and memoranda, the Hon. John W. Potter on December 7, 1988:

1. Dismissed the Complaint and Amended Complaint as to the follwing Defendants:

A. Thomas Greenwell

B. Jo Stratton

C. Vonda Spradling

D. Larry Beale

E. Kimbra Taylor, and

F. Mary Roberts.

2. The remaining Defendants' Motions for Summary Judgment were denied.

3. Stated that this was a final Order and that there was no just cause for delay. No appeal was taken from this Final Order.

On February 2, 1990, the "Labor Cabinet Defendants" filed a Motion for Summary Judgment accompanied by an extensive memorandum with numerous exhibits in support of the Motion.

On March 5, 1990, the Hon. John W. Potter sustained the Defendat's Motion for a protective order and stayed discovery pending ruling on the then pending Motion for Summary Judgment.

On March 12, 1990, the Court permitted Hon. Daniel T. Taylor, II to serve as co-counsel with Plaintiff.

Cn March 13, 1990, the Defendants who were constitutional officers filed their Motion for Summary Judgment, accompanied by

a memorandum in support of such Motion.

On April 4, 1990, the Hon. John Potter set aside his Protective Order of March 5, 1990, to permit additional depostitions to be taken by Plaintiff, and set a pretrial conference for June 25, 1990.

On April 6, 1990, all parties involved in this litigation, by counsel and pursuant to Rule 41.01(1), agreed to dismiss the class action against the constitutional officers that was included by Plaintiff in his First Amended Complaint, and filed a stipulation of dismissal.

Only July 2, 1990, because the Hon. John W. Potter had been appointed as special judge in a Bullitt County case, and "in order to equalize the case load", the regular Circuit Judge for the 55th Judicial Circuit was designated Special Judge to complete the trial of this action.

Subsequently on August 8, 1990, the Special Judge entered an Order:

1. Requiring the parties to complete their discovery on or before September 7, 1990.
2. Giving each party until September 28, 1990, to file their memorandum in support of their motions for Summary Judgment.
3. Giving each party until October 19, 1990, to respond to the memorandum of the opposing party.
4. Setting October 26, 1990, as the date of submission.

On October 16, 1990, as the date of submission. Motion, amended his Order of August 28, 1990, granting:

1. Plaintiff until October 29, 1990, to file his brief.
2. Defendants until November 12, 1990, to file their response.

3. Plaintiff until November 19, 1990, to file his response, and providing that the action would stand submitted on all issues on November 26, 1990.

The parties were given more than adequate time to complete their discovery and this action is now ripe for submission on the pending Motions for Summary Judgment.

The record, depositions, exhibits and memoranda filed by the parties disclose only minor issues of fact. The parties, however, are in deep conflict on the inferences to be drawn from the undisputed facts.

The Court's function under Rule 56 at this stage of the proceedings is not to weigh the evidence and determine the truth of the matter. Rather its function is to determine whether there is a genuine issue

for trial. Thus the threshold inquiry is to determine if there are any genuine factual issues that can be resolved only by a finder of fact because they may be reasonably resolved in favor of either party.

This standard is said to mirror the standard for a directed verdict under Rule 50, which is "that the trial judge must direct a verdict if, under governing law, there can be but one reasonable conclusion as to the verdict". Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986).

The standard adopted by the United States Supreme Court is being followed by this Court. In Celotex Corporation v. Catlett, 106 S.Ct. 2548 (1986) the court said that Rule 56 "mandates the entry of summary judgment after an adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to

establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof. In such a situation, there can be 'no geniune issue as to any material fact,' since a complete failure of proof concerning a essential element of the non moving party's case necessarily renders all other facts immaterial".

In the present instance, although there may exist some inconsequential and immaterial issues of fact, there exist no genuine issues of material fact, and the remaining Defendants are entitled to judgment as a matter of law.

FINAL JUDGMENT

Motion having been made by the Labor Cabinet Defendants for Summary Judgment and Motion having been made by Plaintiff for Summary Judgment, and the Court having considered the record, depositions,

affidavits, exhibits and memoranda of counsel, and the Court being advised,

IT IS ORDERED AND ADJUDGED as follows:

1. That the Motion of Plaintiff for Summary Judgment be and the same is overruled;

. That the Motion of the Labor Cabint Defendants be and the same is hereby granted and the Complaint and First Amended Complaint are dismissed in their entirety, with prejudice against Carol M. Palmore, individually and as Secretary of the Kentucky Labor Cabinet; Kentucky Labor Cabinet; Commonwealth of Kentucky; Rex Hunt, individually and officially as General Counsel to the Kentucky Labor Cabinet; Roxanne Miller; Mary Miles; Elaine Likens; Mary Ann Kiwala; Patricia Hayden and Dennis Kline; and

3. That the Defendants recover their costs herein expended.

This is a final and appealable Judgment and there is no just cause for delay.

ATHOL LEE TAYLOR
SPECIAL CIRCUIT JUDGE

January 3, 1991

# # # # # # #

COMMONWEALTH OF KENTUCKY COURT OF APPEALS

NO. 91-CA-269-MR APRIL 24, 1992

AUBREY WILLIAMS APPELLANT
APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ATHOL LEE TAYLOR, SPECIAL JUDGE
v. ACTION NO. 88-CI-4547

CAROL M. PALMORE: COMMONWEALTH OF KENTUCKY, KENTUCKY LABOR CABINET; REX HUNT; ROXANNE MILLER; ELAINE LIKENS; MARY MILES; DENIS KLINE; MARY ANN KIWALA; and PATRICIA HAYDEN APPELLEES

AFFIRMING

BEFORE: EMBERTON, JOHNSON and WILHOIT, Judges.

WILHOIT, JUDGE. The appellant, Aubrey Williams, was discharged from his

employment as the director of the Special Fund by the appellee, Carol M. Palmore, in September 1987. At the time of William's dismissal, Palmore was Acting Secretary of the Labor Cabinet and had been serving in that capacity since March 1987. Williams, after obtaining a "right to sue" letter from the EEOC, filed a complaint in which he alleged, inter alia, that he was discharged because of his race. The complaint also contained a count alleging defamation.

In its final judgment, the circuit court stated that it was following the more relaxed summary judgment standard articulated in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986). After the entry of the circuit court judgment, our Supreme Court rendered its decision in Steelvest, Inc. v. Scansteel Service Cter., Ky., 807 S.W.2d

476 (1991), in which the Court held that it was adhering to a more stringent standard for summary judgments. As stated in Paintsville Hospital Co. v. Ross, Ky., 683 S.W.2d 255 (1985), summary judgment is proper only where the movant clearly shows the adverse party cannot prevail under any circumstances. The movant must show the nonexistence of any material fact, and only where it appears impossible for nonmoving part to produce evidence at trial warranting a judgment in his favor is summary judgment proper. Steelvest, 807 S.W. 2d at 482. The Court also stated, however, that a party opposing a summary judgment motion must present some affirmative evidence demonstrating the existence of a genuine issue of material fact. Id.

Williams claimed that he was discharged from his employment because he

is black. The parties practiced this case under the three-step analysis for this type of claim outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). The claimant must first establish a prima facie case of racial discrimination. A prima facie case is established by showing that the complainant is a member of a racial minority, that he satisfactorily performed his job, that nonetheless he was terminated, and that he was replaced by someone outside of the protected class. Harker v. Federal Land Bank of Louisville, Ky., 679 S.W.2d 226, 230 (1984); see also M. Player, Employment Discrimination Law 5.44 (1988). A prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible

facts. . . . Thus, when all legitimate reasons for [terminating an employee] have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with some reason, based his decision on an impermissible consideration such as race." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L. Ed. 2d 957 (1978). Once a prima facie case is established, the employer has the burden of producing evidence that the employment decision was based on some legitimate, nondiscriminatory reason. McDonnell Douglas, 411 U.S. at 802. If the employer advances legitimate, indiscriminatory reasons for the decision, the presumption raised by the prima facie case is rebutted. Texas Dep't of Community Affiars v. Burdine, 450 U.S. 248, 255, 101 S. Ct. 1089, 67 L. Ed. 207 (1981). The

complainant then has the opportunity to show that the employer's proffered reason is pretextual. McDonnell Douglas, 411 U.S. at 802. The McDonnell Douglas test is not meant to be "rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate evidence in light of common experience as it bears on the critical question of discrimination." Furnco Constr. Corp., 438 U.S. at 577.

Williams's dismissal was preceded by an internal investigation of the Louisville office of the Special Fund. The investigation was conducted by a staff attorney and a personnel administrator of the Labor Cabinet and was ordered by Palmore following the filing of grievances against Williams by three employees of the Louisville office of the Special Fund. After receiving the report of the

investigation on August 25, 1987, Palmore terminated Williams's employment. Specific reasons given in the September 2, 1987, letter informing Williams of the termination included the follwing:

1. Erratic management style and harrassment and intimidation of employees under your supervision;

2. Your violation and threatened violation of rights afforded to Merit employees by Personnel Rules and Regulations;

3. Strong evidence of your misuse of state personnel, equipment, supplies, and postage for personal reasons.

Williams contends that he established a prima facie case despite the fact the person hired to replace him as director of the Special Fund, Larry Beale, was also black. He points to Furnco Construction Corp. v. Waters, where one of the three black complainants was eventually hired, in additon to other blacks, as a part of a work force of bricklayers. Furnco is

factually dissimilar from the case at bar where only one position is to be filled. Williams's attempts to discredit the hiring of Beale are unavailing. Although he maintains Beale's hiring in a nonmerit position with less than three months remaining in the administration was unprecedented, he overlooks John C. Wells's testimony listing the reasons why appointments would be made and accepted with short periods remaining in an administration, as well as Wells's own appointment with six months remaining in an adminstration. Williams also failed to produce evidence that he was satisfactorily performing his job at the time of his dismissal.

Williams did not establish a prima facie case of discrimination; this alone entitles the appellees to a summary judgment on his discrimination claim. See

45B Am. Jr. 2d Job Discrimination 1960 (1986). However, even if he had established facts sufficient for a prima facie case, the appellees clearly met the second part of the McDonnell Douglas test. Palmore gave at least three clear, specific reasons for the dismissal in her letter to Williams. See Burdine, 450 U.S. at 257-58. Palmore stated that she was discharging Williams because of his erratic management style, his violation and threatened violation of rights afforded merit employees, and "strong evidence" of misuse of state funds. The report of the internal investigation also contained other reasons supporting Palmore's decision to discharge Williams. The employer's burden at this step of the analysis is not to "Persuade the court that it was actually motivated by the proffered reasons. (Citation ommitted.)... The explanation provided

must be legally sufficient to justify a judgment for the defendant." Burdine, 450 U.S. at 254-55.

Much of Williams's brief is dedicated to showing tht Palmore's stated reasons for dismissal were pretextual. As stated in Harker, a complainant must produce specific evidence that his discharge was unlawfully motivated for racially discriminatory reasons. 679 S.W.2d at 231. KRS Chapter 344 was not designed as a vehicle to provide judicial review of termination decisions; its purpose is to prevent employment decisions to be motivated by discriminatory factors. Id. There is evidence that Palmore did not agree with Williams's management style and that she was of the opinion that Williams was not fulfilling the duties as director of Special Fund. Lacking in the evidence, however, are "cold, hard facts," see id.,

that Palmore's decision to terminate Williams was motivated by racial discriminatory reasons. Summary judgment on this claim was properly entered.

Williams claims on appeal that his wrongful discharge claim was erroneously dismissed.[1] Williams did not plead that his discharge was based on his refusal to violate the law is his complaint or first amended complaint, which pleadings were dismissed by the circuit court in the final

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[1]At oral argument, Williams modified his argument to contend that he alleged the tort of outrage. See Craft v. Rice, Ky., 671 S.W.2d 247 (1984); Humana of Kentucky, Inc. v. Seitz, Ky., 796 S.W. 23d 1 (1990). Not only was this argument not preserved for review, see CR 76.12(4)(c)(iv), but Williams fails to show where his complaint, first amended complaint, or tendered second

judgment. He did plead wrongful discharge in his tendered second amended complaint; however, he did not secure a ruling permitting the filing of the complaint from the circuit court prior to the entry of the final judgment. Any error in this respect is therefore waived. See Parrish v. Karr, 255 Ky. 573, 74 S.W.2d 937 (1934). Nevertheless, Williams fails to point to which law he allegedly refused to violate, which refusal culminated in his dismissal. Williams contended that Palmore discharged him because he objected to the award of personal service contracts to Palmore's friends and former associates. However, a review of the statutes and regulations

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amended complaint that this cause of action was sufficiently pled.

regarding the awared of personal service contracts in existence reflects that Williams's apporoval to the award of such contracts was not necessary. See KRS 45.700 et seq. (now KRS 45A.690 et seq.).

Williams also appeals the dismissal of his claim of defamation against Palmore.[2] Williams claims the internal review and the dismissal letter were defamatory. Specifically, he points to the statement in the letter of "strong evidence of your misuse of state personnel, equipment,

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[2]The complaint also contained a count of defamation against employees of the Labor Cabinet. No issue regarding the dismissal of this count is listed in the prehearing statement, or discussed in the appellant's brief. We therefore limit the defamation issue to the claim against Palmore.

supplies, and postage for personal reasons." Williams asserts that KRS 18A.075 and 101 KAR 1:370 did not give Palmore authority to conduct the internal investigation, and the that the statements were not privileged.

If the statements made by Palmore are absolutely privileged, any evidence of malice or ill will is rendered immaterial. Tanner v. Stevenson, 138 Ky. 578, 128 S.W. 878, 881 (1910). In this jurisdiction three is a decided preference for the grant of qualified privilege instead of absolute privilege. See Lanier v. Higgins, Ky. App., 623 S.W.2d 914 (1981). See also D. Elder, Kentucky Tort Law: Defamation and the Right of Privacy 1.11(c) (1983). Absolute privilege applies only to "judicial and legislative proceedings, matters involving military affairs, and communications made in the discharge of a

duty under express authority of law by or to heads of executive departments of state." Tanner, 128 S.W. at 881. Communications by or to executive heads of executive departments are given absolute privilege not "to protect the malicious official from the consequences of his wrongful act, but to protect the whole public from weak and vacillating public service by those upon whom such duties are imposed by law." McAlister & Co. v. Jenkins, 214 Ky. 802, 284 S.W. 88, 91 (1926).

Palmore stated that she authorized the internal review after the filing of six grievances by three employees. However, even without the filing of the grievances, as Acting Secretary of the Labor Cabinet Palmore would have the authority to ensure the proper functioning of the Cabinet. KRS 12,040(4) directs department heads in the

executive branch of state government to "exercise supervision over the personnel and financial records of their respective departments." The statements made in the discharge letter and accompanying summary of the internal review are absolutely privileged.

The circuit court judgment is affirmed.

ALL CONCUR.

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SUPREME COURT OF KENTUCKY
92-SC-809-D
(91-CA-269)

AUBREY WILLIAMS, MOVANT,
JEFFERSON CIRCUIT COURT
V. 88-CI-4547

CAROL PALMORE, LABOR CABINET, ET AL., RESPONDENTS.

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

All sitting. Combs, J., would have granted discretionary review.

ENTERED March 12, 1993.

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Chief Justice

NO. 93 -

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

AUBREY WILLIAMS

V. Petitioner

CAROL M. PALMORE; COMMONWEALTH OF KENTUCKY; KENTUCKY LABOR CABINET; REX HUNT; ROXANNE MILLER; ELAINE LIKENS; MARY MILES; DENIS KLINE; MARY ANN KIWALA; AND PATRICIA HAYDEN,

Respondents.

PETITION FOR WRIT OF CERTIOARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

CERTIFICATE OF SERVICE

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PETITIONER

It is hereby certified that copies of this corrected Petition for a Writ of Certiorari were mailed by U.S. mail, postage prepaid, this 7th day of July, 1993, to the following indivduals:

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I further certify that all parties required to be served have been served.

Aubrey Williams

AUBREY WILLIAMS